Family and Medical Leave Act (FMLA)

The FMLA provisions are outlined in the NAPE/AFSCME and State of Nebraska Labor Contract, the SLEBC and State of Nebraska Labor Contract, the Classified System Personnel Rules and Regulations, and federal statutes and regulations. Listed below are some highlights of these sections.

FMLA leave is unpaid time off from work. An employee can use paid vacation leave, compensatory time, or sick leave (see valid reasons for using sick leave in Section 14.11 of the NAPE/AFSCME Labor Contract, Section 11.3.1 of the SLEBC labor contract, and Chapter 10, Section 005.001 of the Classified System Personnel Rules and Regulations), as part of their 12 weeks of FMLA Leave, if the employee should so choose. An employee must have at least twelve total months of service and at least 1250 hours (actual work hours) of service in the previous twelve month period to be eligible for FMLA Leave. Leaves and observed holiday time do not count toward the 1250 hours, only time worked counts. Temporary employment with the State of Nebraska counts toward an employee's eligibility.

Requests for sick leave should be approved/denied based upon your agency's application of the sick leave provisions contained in the applicable labor contracts and the Rules. The FMLA does not change the way the State administers sick leave. An employee may receive approval in advance for the intermittent use of FMLA. Approval of employee requests for vacation leave during periods of unpaid FMLA in order to receive pay for a holiday which occurs during an unpaid FMLA is not recommended but is allowed. A minimum of 30 days notice to the Agency must be provided by the employee before he/she may use FMLA Leave. Where 30 days notice is not foreseeable, notice must be given as early as possible.

Leave Entitlement.
A covered employer must grant an eligible employee up to a total of **12 workweeks** of **unpaid** leave during any 12-month period for one or more of the following reasons:

- for the birth and care of a newborn child of the employee;
- for placement with the employee of a son or daughter for adoption or foster care;
- to care for a spouse, son, daughter, or parent with a serious health condition;
- to take medical leave when the employee is unable to work because of a serious health condition;
- for qualifying exigencies arising out of the fact that the employee's spouse, son, daughter, or parent is on active duty or call to active duty status as a member of the Armed Forces, National Guard or Reserves in support of a contingency operation in a foreign country;
- A covered employer also must grant an eligible employee who is a spouse, son, daughter, parent, or next of kin of a current member of the Armed Forces, National Guard or Reserves; next of kin of a member who left the Armed Forces, National Guard or Reserves less than five years ago; with a serious injury or illness up to a total of **26 workweeks** of **unpaid** leave during a "single 12-month period" to care for the service member.

Spouses employed by the same employer are limited in the **amount of** FMLA leave they may take for the birth and care of a newborn child, placement of a child for adoption or foster care, or to care for a parent who has a serious health condition, to a combined total of 12 weeks (or 26 weeks if leave to care for a covered service member with a serious injury or illness is also used). Leave for birth and care, or placement for adoption or foster care, must conclude within 12 months of the birth or placement.

Under some circumstances, employees may take FMLA leave intermittently – taking leave in separate blocks of time for a single qualifying reason – or on a reduced leave schedule – reducing the employee's usual weekly or daily work schedule. When leave is needed for planned medical treatment, the employee must make a reasonable effort to schedule treatment so as not to unduly disrupt the employer's operation. If FMLA leave is for birth and care, or placement for adoption or foster care, use of intermittent leave is subject to the employer's approval.

Under certain conditions, employees **or** employers may choose to "substitute" (run concurrently) accrued **paid** leave (such as sick or vacation leave) to cover some or all of the FMLA leave. An employee's ability to substitute accrued paid leave is determined by the terms and conditions of the employer's normal leave policy.

"Serious health condition" means an illness, injury, impairment, or physical or mental condition that involves either:

- Inpatient care (*i.e.*, an overnight stay) in a hospital, hospice, or residential medical-care facility, including any period of incapacity (*i.e.*, inability to work, attend school, or perform other regular daily activities) or subsequent treatment in connection with such inpatient care; **or**

- Continuing treatment by a health care provider, this includes:

  (1) A period of incapacity lasting more than three consecutive, full calendar days, and any subsequent treatment or period of incapacity relating to the same condition that **also** includes:

    - treatment two or more times by or under the supervision of a health care provider (*i.e.*, in-person visits, the first within 7 days and both within 30 days of the first day of incapacity); **or**

    - one treatment by a health care provider (*i.e.*, an in-person visit within 7 days of the first day of incapacity) with a continuing regimen of treatment (*e.g.*, prescription medication, physical therapy); **or**

  (2) Any period of incapacity related to pregnancy or for prenatal care. A visit to the health care provider is not necessary for each absence; **or**

  (3) Any period of incapacity or treatment for a chronic serious health condition which continues over an extended period of time, requires periodic visits (at least twice a year) to a health care provider, and may involve occasional episodes of incapacity. A visit to a health care provider is not necessary for each absence; **or**

  (4) A period of incapacity that is permanent or long-term due to a condition for which treatment may not be effective. Only supervision by a health care provider is required, rather than active treatment; **or**

  (5) Any absences to receive multiple treatments for restorative surgery or for a condition that would likely result in a period of incapacity of more than three days if not treated.

In the case of a member of the Armed Forces, including the National Guard and Reserves- A **"serious injury or illness"** is one that occurs in the line of duty on active duty that may render the service member medically unfit to perform the duties of his or her office, grade, rank or rating [29 U.S.C. § 2611(18)], and in the case of a veteran, one that was incurred in the line of duty on active duty that manifested itself before or after the member became a veteran.

Health Insurance while on FMLA Leave. Employer health insurance contributions shall continue during an employee's unpaid FMLA Leave absence, provided the employee makes his/her required contribution and intends to return to work for at least 30 days following his/her FMLA leave except as specified below. Employer contributions shall be based as if the employee had continued to work his/her normal schedule. When an employee does not return from FMLA Leave for a reason other than: 1) the continuation, recurrence, or onset of a serious health condition which would entitle the employee to FMLA Leave; or, 2) other circumstances beyond the employee's control, the employee will be required to reimburse the State for the State's share of health insurance premiums paid on the employee's behalf during the FMLA Leave. Personnel Contacts should continue to coordinate questions regarding health insurance with the AS-Employee Benefits Section, (402) 471-4443.

Effect of Leave on Bonuses. Employers may disqualify employees from bonuses or other achievement payments based on job related performance goals, such as attendance or products sold, when the employee has not met the goal because they took FMLA leave, as long as the same rules apply to employees on other types of leave.

Employers Can Directly Contact the Employee's Doctor. An employer's HR administrator, leave administrator, or management official (but not the direct supervisor) may directly contact an employee's health care provider to clarify and authenticate the certification after giving the employee an opportunity to cure any deficiencies in the medical certification.

Recertification. If an employee is taking leave intermittently or is on a reduced work schedule, an employer can't require recertification before the end of the minimum period of the initial certification. The Federal Regulations at §825.308, in summary, state:

> If the minimum duration of the period of incapacity specified on a certification furnished by the health care provider is more than 30 days, the employer may not request recertification until that minimum duration has passed. For FMLA taken intermittently or on a reduced leave schedule basis, the employer may not request recertification in less than the minimum period specified on the certification as necessary for such leave (including treatment) unless one of the conditions set forth in paragraph (c) (1), (2) or (3) of Section 825.308 of the Federal Regulations is met.
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> The exceptions listed in (c) (1), (2) or (3) include when:
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> (1) The employee requests an extension of leave;
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> (2) Circumstances described by the previous certification have changed significantly (e.g., the duration of the illness, the nature of the illness, complications); or
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> (3) The employer receives information that casts doubt upon the continuing validity of the certification.

If you have any questions on the Family and Medical Leave Act, please contact William J. Wood at (402) 471-4106, *Vacant* at (402) 471-8292, or Gail Brolliar at (402) 471-4104.